

95360

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

50529

FILE: B-182647

DATE: February 12, 1975

MATTER OF: Dynamech Corporation

DIGEST:

Where low bidder alleges mistake in bid prior to award, and seeks to have bid "corrected" through a post-bid opening recomputation of a significant portion of its bid, GAO has no basis for disagreeing with contracting officer's determination permitting withdrawal but not correction where he found "clear and convincing" evidence of mistake but not of intended bid price.

Invitation for bids (IFB) No. N00600-75-B-0012 was issued July 23, 1974, by the Naval Regional Procurement Office, Washington Navy Yard, Washington, D. C., for the supply of four items of Ship-to-Shore Conveyor Belts in accordance with stipulated specifications. Bid opening was conducted on August 21, 1974, and seven bids were received. Since the difference in the low bid of Dynamech Corporation as compared to the next low bid was of such a magnitude (approximately 30 percent lower) Dynamech was requested by letter of August 21, 1974, to review its prices and specifications to determine whether an error had been committed, and if such was in fact the case, to submit a written statement as to the nature of the error, documentation of the error and a request for correction or withdrawal of the bid.

By letter of September 9, 1974, Dynamech advised the procuring activity that it had conducted a detailed review and had discovered two major errors. Dynamech explained that it had utilized its cost documents for a 1970 bid on a virtually identical item on which it was the second low bidder, and from such base, after various adjustments, computed its current price for the item by applying an inflationary factor of 25 percent to the 1970 material costs. In so doing, however, Dynamech stated that it neglected to apply the 25 percent inflationary factor to its "mechanical" cost. Dynamech's president advised that he could furnish no logical reason for his error except that "perhaps a phone call interrupted me." It was stated that the 1970 mechanical cost subtotal of \$2,900 had been used in computing the current bid, but the 25 percent inflationary factor had not been computed in. Furthermore, Dynamech advised that in order to "make sure of our bid," it reviewed its cost data and

then compiled a "detailed new mechanical material cost sheet" as a result of the August 21 letter asking it to confirm its prices. In so doing, Dynamech states that it could not find the cost of a gear box under either its mechanical or electrical headings in the 1970 estimates, but upon questioning the electrical estimator, the latter advised that he remembered reducing the motor and gear box price for the 1970 bid from \$1,390 to \$740 with the notation that the estimate used "3 to 1 sprockets." Since the gear box was allegedly omitted from the 1974 bid, Dynamech's post-bid opening worksheets, dated September 19, 1974, show a recomputation of its mechanical materials costs to allow for both inflation and the gear box, along with some other post-bid opening adjustments. Based upon such recomputations, Dynamech requested adjustment of its unit prices on items 0001 and 0003 from the original bid of \$11,299 to \$13,274, and on items 0002 and 0004 from the \$10,310 bid, to \$11,225. In so "correcting" its bid, Dynamech stated that its revised price is still \$57,678 below the second low bid, presenting considerable savings to the Government.

By letter of September 12, 1974, to the procuring activity Dynamech sought to establish the validity of the 25 percent inflationary factor which it applied to its 1970 costs. It advised that its primary business is comprised of the construction of material handling systems for bakeries, using plastic or steel wire shopping baskets. In this regard, the letter enclosed worksheets for a 1974 commercial order, and those for a similar commercial project in 1970. The worksheets for the 1974 commercial project include the recommendation to "Double the steel price; increase electrical 20 percent; increase mechanical 25 percent." The actual completed computations indicate an increase for mechanical items of 25.71 percent. These worksheets were submitted for the purpose of establishing the 25 percent factor for the bid herein at issue.

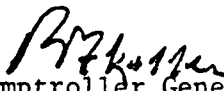
Armed Services Procurement Regulation (ASPR) § 2-406.3(3) (1974 ed.) permits "correction" of a bid only where there is "clear and convincing evidence" of both the existence of a mistake and the bid price actually intended. Based upon the foregoing evidence, the contracting officer found that while there was clear and convincing evidence as to the existence of a mistake, there was not clear and convincing evidence as to the bid price actually intended. Accordingly, Dynamech was advised that it would be permitted to withdraw its bid but not correct it. Award was subsequently made to the next low bidder.

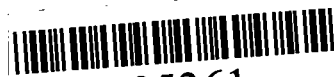
While this Office originally considered correction of mistakes in bids alleged after bid opening and prior to award, this authority was subsequently delegated to the procuring agencies. 51 Comp. Gen. 1, 3(1971). Although we have retained the right to review the administrative determination, the weight to be given the evidence is a

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question of fact to be considered by the administratively designated evaluator of the evidence, and such determination will not be disturbed by our Office unless there is no reasonable basis for the determination. 51 Comp. Gen. 1, 3, supra. Moreover, while the evidence necessary to establish the existence of a mistake must also be "clear and convincing", the degree of proof required is in no way comparable to that necessary to allow correction. 52 Comp. Gen. 258, 261 (1972). In this regard, the protester does not request correction of an error manifested by its worksheets, but is seeking correction of an alleged mistake on the basis of computations performed after the opening of bids. Without the benefit of such post-bid opening worksheets, entitled "Rework post award," there is no evidence to permit an ascertainment of the intended bid. Even the 25 percent inflationary factor which the protester wishes applied did not appear on the worksheets for the bid in question, but was supplied in the form of extrinsic evidence from worksheets for unrelated commercial projects. Based upon our review of the record, we find no basis for disagreeing with the contracting officer's conclusion that while the protester committed some errors in its bid, the evidence was not clear and convincing as to the intended bid price.

In view thereof, we have no basis to object to rejection of the Dynamech bid and award to the next low responsive, responsible bidder.


Acting Comptroller General
of the United States



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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

50528

FILE: B-182679

DATE: February 12, 1975

MATTER OF: Advance Conversion Devices Company

DIGEST:

Agency action of opening proposals without amending allegedly ambiguous specification in light of protester's earlier letter of complaint is adverse agency action and protest filed with GAO more than 5 days after that action is untimely under section 20.2(a) of bid protest procedures.

On November 15, 1974, Advance Conversion Devices Company (Devices) filed a protest against the award of any contract under request for proposals (RFP) M00150-75-R-0104 by the Marine Corps Supply Activity, Philadelphia, Pennsylvania, for 84 solid-state frequency converters.

Under date of January 2, 1975, the procurement agency submitted a documented report on the protest and, upon review thereof, we have concluded that the protest may not be considered under our bid protest procedures. The RFP was issued on September 3, 1974, with a scheduled closing date for receipt of proposals of October 3, 1974. By letter of September 23, 1974, Devices advised the contracting officer that the specifications were not sufficiently definite and complete to assure that the item would perform as intended. Devices noted certain areas it felt deficient, pointed out alleged omissions and concluded that it would prepare its proposal in accordance with the specifications. In addition, Devices indicated that it would submit an alternate proposal on the basis outlined in the letter, which would be substantially the same as a model solicited by the United States Coast Guard in another procurement.

In view of this letter, the activity reviewed its technical requirements and concluded that it adequately reflected the Government's minimum need without clarification. To facilitate its review, the closing date for receipt of proposals was extended to November 4, 1974, by amendment 0001. This change was orally communicated to Devices by telephone conversation of September 26, 1974. In an October 9, 1974, telephone conversation with Devices, the contracting officer stated that the technical review concluded that the specification did not need

to be revised. Further, it was noted that the equipment Devices had produced for the Coast Guard was more complicated and sophisticated than was necessary for the activity's purposes. At the conclusion of the conversation, Devices expressed its desire to meet with technical personnel to discuss the specifications.

While Devices did not submit a proposal, by letter dated November 4, 1974, Devices explained its reasons for its "NO-BID." Also, Devices again pursued its request to meet with technical personnel to explain the deficiencies with the specification and demonstrate its product. Devices also stated that it was not protesting at that time. Of the six proposals that were opened on November 5, 1974, none excepted to the technical requirements of the specification. On November 11, 1974, the contracting officer again denied Devices request for a meeting at that time and on November 14, 1974, Devices sent its telegraphic protest to our Office.

Section 20.2(a) of our bid protest procedures requires that:

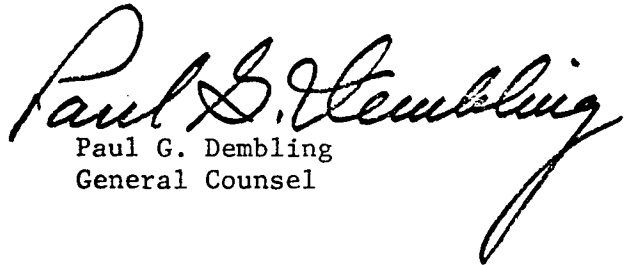
"* * * Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was made timely."

The alleged deficiencies in the RFP were clearly apparent to Devices prior to the closing date for receipt of proposals, as evidenced by its letter of September 23, 1974. Even viewing Devices' actions in a light most favorable to it by considering the September 23 letter as a protest, when the procurement activity advised

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Devices on October 9, 1974, that it had reviewed its specification and determined that no changes were necessary and the RFP would not be amended as requested, Devices was required to protest to our Office within 5 days of that notification of adverse agency action. In any event, the opening of proposals on November 5, 1974, without modifying the RFP is deemed adverse agency action within the meaning of section 20.2(a) above.

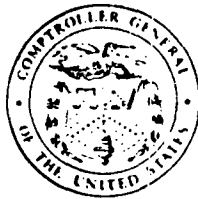
Therefore, since Devices' protest was not filed until November 15, 1974 (10 days after the closing date for receipt of proposals, or 24 days after notification that the RFP would not be amended as requested), it is untimely and will not be considered on its merits.


Paul G. Dembling
General Counsel



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DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

50539

FILE: B-168914

DATE: FEB 12 1975

MATTER OF: John E. Thomas - Time limitation on settlement
dates in real estate transactions

DIGEST: Employee who was transferred from Cincinnati to Washington on August 20, 1972, and was unable to sell or enter into contract for sale of residence at old official station during initial 1-year period due to illness in family is entitled, where request is made in writing, to extension of 1 year, not to exceed 2 years from the effective date of his transfer, to settle sale of residence under provisions of FPMR A-40, section 2-6.1e, which became effective on May 1, 1973, within the initial year of his transfer. See B-181983, January 3, 1975 (54 Comp. Gen. ____).

This action is submitted for decision by the Chief, Accounting Branch (HFA-120), Department of Health, Education and Welfare, Public Health Service, Food and Drug Administration, as to whether under the circumstances described herein the extension of the 1-year time limitation relating to the completion of a real estate transaction may be approved.

The record indicates that Mr. John E. Thomas' official duty station was transferred from Cincinnati, Ohio, to Washington, D.C., effective August 20, 1972. On June 5, 1974, Mr. Thomas requested the limitation on settlement dates for real estate transactions be extended because of illness of his mother-in-law who lived with him. He did not take any action during the initial 1-year period for the sale of his residence at the old official duty station which was occupied by members of his family until July 1973. The record does not disclose that any contract was entered into by Mr. Thomas for the sale of the residence in Cincinnati, nor that there was any litigation concerning the sale of the property which would have justified extension of the 1-year period under the pertinent regulation applicable at the time of Mr. Thomas' transfer. See section 4.1e, Office of Management and Budget (OMB) Circular No. A-56, revised August 17, 1971.

During the initial 1-year period, however, the provisions of OMB Circular No. A-56 were superseded by General Services

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Administration (GSA) Bulletin FPMR A-40, effective May 1, 1973, and the requirements for extension of the initial 1-year period for settling real estate transactions were liberalized by section 2-6.1e which provides as follows:

"Time limitation. The settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested are not later than 1 (initial) year after the date on which the employee reported for duty at the new official station. Upon an employee's written request this time limit for completion of the sale and purchase or lease termination transaction may be extended by the head of the agency or his designee for an additional period of time, not to exceed 1 year, regardless of the reasons therefor so long as it is determined that the particular residence transaction is reasonably related to the transfer of official station." (Emphasis added.)

In that connection GSA, the agency given authority under Executive Order No. 11609, July 22, 1971, to issue regulations concerning the relocation benefits of employees of the Federal Government, commenting on the background of this regulation, stated:

"Background. The pertinent regulations in OMB Circular No. A-56 originally permitted an exception to the time limitation of 1 year for the completion of the sale or purchase of a residence only when settlement was delayed because of litigation. In 1969 the regulations were amended to permit an extension of time for reasons other than litigation when a valid contract of sale/purchase had been executed within the initial 1-year period from the time an employee reported to his new duty station. Experience has shown that there are instances in which employees, acting in good faith, do not possess valid contracts of sale/purchase at the expiration of the initial 1-year period due to reasons beyond their control. Therefore, the

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regulations are being amended to authorized heads of agencies or their designees to grant extensions of the 1-year period when they are justified." (Emphasis added.) Federal Register, Vol 37, No. 209 Saturday, October 28, 1972.

Our previous interpretation of these provisions has been that the regulations thus amended permit an extension of an additional 1 year "to be granted at the discretion of the agency for any justifiable reason as long as the transaction is reasonably related to the employee's transfer," and "the request has been made in writing within the time limitation as required by the regulation." See B-181983, January 3, 1975 (54 Comp. Gen. ____).

Accordingly, we have no objection to the administrative approval of Mr. Thomas' request for a 1-year extension for the sale of his residence in Cincinnati not to exceed 2 years from the effective date of his transfer to Washington, D.C.

R.F. KELLER

Acting Comptroller General
of the United States